(2)

Supreme Court, U.S.
FILED
JUL 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-2112

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PAMELA J. BURAK, PETITIONER,

V.

GENERAL AMERICAN LIFE INSURANCE COMPANY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Grant, McHendrie, Haines and
Crouse
Professional Corporation
By: Donald M. Burkhardt
1700 Lincoln Street, Suite 3000
Denver, Colorado 80203-1086
(303) 825-5111

Counsel of Record for the
Respondent

QUESTION PRESENTED

Whether a federal appeals court denied petitioner her constitutional rights to due process and jury trial by reversing the lower court's judgment for petitioner and directing entry of judgment in favor of respondent and not remanding for trial where no genuine issues of material fact under Fed. R. Civ. P. 56 were raised before the district court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i
TABLE OF AUTHORITIES.....iii
REVISED STATEMENT OF THE CASE.....vi
REASONS FOR DENYING THE WRIT..... 1

I. The Tenth Circuit Order Directing Entry Of Judgment For Respondent Has Not Denied Petitioner A Full Trial On The Merits Concerning Issues As To Which She Had Every Opportunity To Present Evidence Before The District Court And Does Not Conflict With A Prior Decision Of This Court..... 3

II. The Tenth Circuit Decision Does Not Conflict With The Decisions Of Other Federal Courts Of Appeal On The Same Matter.....13

III. The Decision Below Does Not Create An Intra-Circuit Conflict On The Same Issue.....19

CONCLUSION.....21

TABLE OF AUTHORITIES

CASES — PAGE

UNITED STATES SUPREME COURT DECISIONS:

Fountain v. Filson, 336 U.S. 681, 69 S. Ct. 754, 93 L.ed. 971 (1949).....6, 7

Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 85 L.ed. 1040, (1941).....6, 8, 9

Kern County Land Company v. Occidental Petroleum Corporation, 411 U.S. 582, 93 S. Ct. 1736, 36 L.ed.2 503, (1973).....10

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 91 S. Ct. 1652, 36 L.ed.2 318, (1973).....10

United States v. Mitchell, 403 U.S. 190, 91 S. Ct. 1763, 29 L.ed.2 406 (1971).....10

CIRCUIT COURTS OF APPEALS DECISIONS

Black Warrior Electric Membership Corporation v. Mississippi Power Company, 413 F.2d 1221 (5th Cir. 1969).....17

Blau v. Del Monte Corporation, 748 F.2d 1348 (9th Cir. 1984).....12

Calamia v. Spivey, 632 F. 2d 1235 (5th Cir. 1980).....12

Eagle v. Louisiana and Southern Life Insurance Co., 464 F.2d 607 (10th Cir. 1972).....19

International Longshoremens & Warehousemens Union v. Kuntz, 334 F.2d 165 (9th Cir. 1964).....11

M. Snower & Co. v. United States, 140 F.2d 367 (7th Cir. 1944).....17, 18

Roberts v. Hollandsworth, 582 F.2d 496 (9th Cir. 1978.....13, 14

Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974).....10

Smith v. United States, 362 F.2d 366 (9th Cir. 1966).....13, 14

Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978).....20

Stein v. Oshinsky, 348 F.2d 999 (2nd Cir. 1965).....10

Tomalewski v. State Farm Life Insurance Company, 494 F.2d 882 (3rd Cir. 1974).....15

Wardle v. Central States Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980).....12

UNITED STATES DISTRICT COURT DECISION

Gilliken v. Hughes, 609 F. Supp. 178 (D. Del. 1985).....12

STATUTE

29 U.S.C. 1001.....12

RULES

Fed R. Civ. P. 56.....i, 7

MISCELLANEOUS

6 J. Moore, Federal Practice, Part 2, ¶56.27[2] (2d ed. 1987).....11

10 C. Wright, Federal Practice and Procedure, Section 2716 (2d ed. 1983).....11

10 C. Wright, Federal Practice and Procedure, Section 2714 (2d ed. 1983).....11

REVISED STATEMENT OF CASE

The petitioner's statement of the case requires some clarification. The statement that Ronald James Burak died as the result of an automobile accident is incorrect. As evidenced by the district court's dismissal of the double indemnity claim, his death was not due to an accident. Next, the petitioner waived her right to a jury trial in the May 9, 1985 pretrial order. Lastly, the purported background information, tactics, and strategy of petitioner's counsel for proceeding in the manner he did as outlined in footnote 1 on page 4 of the petition is not part of the record on appeal and, therefore, cannot be considered by this Court. The case was decided on the issues that the petitioner herself framed in the summary judgment proceed-

ings rather than those she would now like to raise for the first time on appeal.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAMELA J. BURAK, Petitioner,

V.

GENERAL AMERICAN LIFE INSURANCE COMPANY, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On June 20, 1988, the respondent received the petitioner's petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in the instant proceeding. Petitioner contends that a writ of certiorari should be granted for the following reasons: (1) the Tenth Circuit has raised an important question of federal law by effectively granting summary judgment in favor of respondent even though genuine issues of

material fact remain for resolution by the district court; (2) the decision of the Tenth Circuit directing the district court to vacate its amended judgment and enter judgment in favor of the defendant conflicts with decisions of other federal courts of appeal for which the Supreme Court should issue a uniform rule; and (3) the decision creates a conflict with a prior decision of the Tenth Circuit.

For the following reasons, respondent disagrees with the above contentions and, therefore, opposes the petition for a writ of certiorari to review the judgment of the appellate court. In short, there are neither special nor important reasons for review of the Tenth Circuit opinion on writ of certiorari. Sup. Ct. R. 17.1.

I.

The Tenth Circuit Order Directing Entry of Judgment For Repondent Has Not Denied Petitioner a Full Trial on the Merits Concerning Issues as to Which She Had Every Opportunity to Present Evidence Before The District Court and Does Not Conflict With a Prior Decision of This Court.

Petitioner believes that the Tenth Circuit has raised an important question of federal law by denying her a full trial on the merits concerning issues as to which she had no opportunity to present evidence before the district court by granting judgment to respondent instead of remanding for trial. Specifically, petitioner alleges that she should be given an opportunity to be

heard on issues relating to whether the endorsement to the insurance policy was brought to decedent's attention and, further, whether the endorsement was inconspicuous as a matter of public policy.

Neither contention was raised in petitioner's complaint filed in state district court nor, after removal to federal district court, in her motion for summary judgment, or in her reply memorandum to respondent's motion for summary judgment. Petitioner had every opportunity to raise these issues in the district court but apparently elected not to do so. Petitioner discusses the specific language of the endorsement in her motion for summary judgment and even anticipated respondent's interpretation of the meaning of the language without making any mention or reference to the

issue of its conspicuousness as a matter of policy or decedent's awareness of the endorsement. Petitioner did not otherwise seek to amend her complaint or move for partial summary judgment and thereby preserve these issues for a later factual determination, or in any other manner or pleading allege that these were genuine litigable issues of material fact requiring specific factual determinations independent of the district court's consideration of the coverage issue. The requirements of due process of law set forth in the Fifth Amendment to the United States Constitution were, therefore, satisfied. As petitioner acknowledges in her petition, the Tenth Circuit itself determined in its opinion that the district court was not asked to make any finding of fact on the conspicuousness of the endorsement and so

the court never reached the issue on appeal. 836 F.2d 1287 at 1291. Matters not raised in the trial court cannot be raised for the first time on appeal.

Petitioner contends that the opinion of the Tenth Circuit allegedly depriving her of an opportunity to present evidence on certain factual issues is in conflict with Fountain v. Filson, 336 U.S. 681, 69 S. Ct. 754, 93 L.ed. 971 (1949) and the reasoning of Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 85 L.ed 1040 (1941). On both points, respondent disagrees.

In Fountain, plaintiffs brought suit to establish a resulting trust in certain real estate and otherwise alleged facts in their complaint on which personal liability of defendants could be established and for which they asserted a general prayer for relief. From the

district court's entry of summary judgment for defendants, the plaintiffs appealed and the court of appeals reversed, directing the district court to enter personal judgment against defendants. A petition for writ of certiorari to the court of appeals was granted, and the Supreme Court reversed for the reason that the order of the appellate court gave the defendants no opportunity to present a defense to the alleged personal obligation to plaintiffs.

The personal obligation of defendants in Fountain was a genuine issue of material fact arising out of the allegations contained in the complaint, the answer of defendants, and the facts set forth in the transcript of depositions taken before trial for which summary judgment under F.R. Civ. P. 56

was not appropriate. This is readily distinguishable from the instant case in which petitioner made no such claim, assertion, or request for factual determination by the district court on the issues relating to conspicuousness of the endorsement as to public policy and awareness of the insured as to the contents of the endorsement in any of the pleadings from the complaint through her motion for summary judgment and reply brief.

Petitioner also looks to the analysis and reasoning of this Court in Hormel v. Helvering, supra, which involved the legal basis for the Commissioner of Revenue's assessment of income tax deficiency against the grantor of a trust and the applicability of a new section of the Internal Revenue Code first raised in the circuit court of

appeals. This Court determined that the case came within the exception to the general rule that parties to litigation should have the opportunity to offer evidence on issues of fact based upon a new theory before the trial court, since this was a case in which Congress gave the circuit courts of appeal broad authority to review and deal with decisions of the Board of Tax Appeals. Unlike this case, Hormel involved a question of taxpayer liability, in which decision this Court viewed a change in the law during the course of appeal of the case as significant. No changes in the law or broad enabling legislation appear in this case.

Hence, the authorities cited by petitioner are readily distinguishable from the instant case and do little to support her argument that an important

principal of federal law requires this court to grant certiorari. Indeed, quite the contrary.

A substantial body of law upholds the propriety of an appellate court disposing of a case in accordance with the law and the facts by ordering that summary judgment be entered for appellant and thus avoiding the necessity of further proceedings, Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 93 S. Ct. 1736, 36 L.ed.2 503 (1973); Mourning v. Family Publications Service, Inc., 411 U.S. 356, 91 S. Ct. 1652, 36 L.ed.2 318 (1973); U.S. v. Mitchell, 403 U.S. 190, 91 S. Ct. 1763, 29 L.ed.2 406 (1971); Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974), cert. denied, 419 U.S. 837 (1974); Stein v. Oshinsky, 348 F2d 999 (2nd Cir. 1965), cert. denied, 382 U.S. 957 (1965);

International Longshoremens & Warehousemens Union v. Kuntz, 334 F.2d 165 (9th Cir. 1964); 6.J. Moore, Federal Practice Part 2, Para. 56.27[2] (2d ed. 1987); 10 C. Wright, Federal Practice and Procedure, § 2716 (2nd ed. 1983). This procedure is especially applicable in a situation such as here where the issue as framed by the petitioner's pleadings was one of law, to wit, the construction and interpretation of contractual language.

Petitioner also would have this Court believe that her Seventh Amendment right to trial by jury has been abrogated. This argument cannot be sustained, because, as we have seen, no genuine issue of material fact exists for further consideration by the district court. See, 10 C. Wright, Federal Practice and Procedure, § 2714 (2d. ed. 1983). Moreover, petitioner in the

pretrial order waived her right to a jury trial on the only other remaining issue of double indemnity under the accidental death provisions of the insurance policy. In any event, this case comes within the provisions of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et. seq., and there is no independent constitutional or statutory right to jury trials in ERISA actions, Wardle v. Central States Southeast and Southwest Areas Pension Fund, 627 F.2d 820, 828-830 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981); Blau v. Del Monte Corp. 748 F.2d 1348 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985); Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Gilliken v. Hughes, 609 F. Supp. 178 (D. Del. 1985).

II.

The Tenth Circuit Decision Does Not Conflict With The Decisions of Other Federal Courts of Appeal On The Same Matter.

Petitioner states that the decision of the Tenth Circuit is in conflict with the decisions of numerous other federal courts of appeals, and therefore alleges that this Court should reverse and decide this case in a way that establishes a uniform rule among the various circuits. Petitioner cites many cases, each of which is, however, distinguishable from the instant case.

From the Ninth Circuit are cited two cases, Smith v. United States, 362 F.2d 366 (9th Cir. 1966) and Roberts v. Hollandsworth, 582 F.2d 496 (9th Cir. 1978). In Smith, the appellate court vacated a district court judgment

dismissing an action brought against the United States for the taking of plaintiff's buildings for past taxes. The Ninth Circuit remanded for a full trial after some facts elicited on oral argument disclosed the need for "a full development of the facts" relating to the standing of plaintiff to bring the action. Quite simply, the Smith case is not applicable here. The question of standing of plaintiffs in Smith to bring the action goes to the very basis on which they brought the case. No such jurisdictional issue is here present where, as the surviving spouse, petitioner had clear standing to commence suit for recovery of the face amount of the policy on her husband's life.

In Roberts v. Hollandsworth, supra, the Ninth Circuit reversed summary judgment entered for defendants and

against plaintiff for the reason that the district court, in granting defendants' motion for summary judgment, was led to believe by ineptness of trial counsel that plaintiff's claims were fraud, conspiracy to defraud and conversion in an amended complaint described as other than "a model pleading". The ineptitude of counsel in district court effectively resulted in failure to plead another theory of law based on money had and received, and so the appeals court reversed and remanded for further consideration of facts substantiating the new claim. No such facts or rationale apply in this case where ability of opposing counsel is not in question.

Tomalewski v. State Farm Life Insurance Company, 494 F.2d 882 (3rd Cir. 1974) is cited by petitioner as another case in conflict with the opinion of the

Tenth Circuit. We disagree. Notwithstanding the issue of fact presented by the widow's claim of having received a gift of an insurance policy patently appearing in the pleadings, the district court granted summary judgment in favor of the insured's mother under a life policy, holding as a matter of law that she was entitled to the proceeds of the policy. On appeal, the Third Circuit reversed the judgment and remanded for further proceedings. In the instant case, no plain issue of fact concerning conspicuousness of the endorsement as a matter of public policy or awareness of the endorsement appeared from the pleadings. Quite the reverse. In no pleading before the district court did petitioner seek or ask the court to make a determination of fact on either of these issues.

Nor is the case from the Fifth Circuit cited by petitioner in her brief of any support to her position that a conflict in holdings between the circuits requires this Court to grant her petition for writ of certiorari. In Black Warrior Electric Membership Corp. v. Mississippi Power Company, 413 F.2d 1221 (5th Cir. 1969), the Fifth Circuit recognized that the district court had not reached a question which was raised in the original complaint but was not raised in a motion for summary judgment and so remanded for further proceedings. In the instant case, no such issues relating to decedent's awareness of the endorsement or to conspicuousness of the document as a matter of public policy were raised in the district court for its consideration.

Finally, M. Snower & Co. v. United States, 140 F.2d 367 (7th Cir. 1944) is

not in conflict with the Tenth Circuit opinion as opposing counsel would have this Court believe. In fact, the case merely stands for the basic proposition that an order for summary judgment by the district court is in error where it fails to address a genuine issue of material fact patently appearing in the pleadings. Again, no such issues as are now pressed by petitioner appeared nor were pled before the district court. Accordingly, the M. Snower case is also distinguishable from the instant matter.

In summary, the above cases cited by petitioner are distinguishable from this case and comport with the usual course of judicial proceedings for which this Court's power of supervision in this case is not justified nor required.

III.

The Decision Below Does Not Create An Intra-Circuit Conflict On The Same Issue.

Petitioner cites the holding of Eagle v. Louisiana and Southern Life Insurance Co., 464 F.2d 607 (10th Cir. 1972) as a Tenth Circuit case in conflict with the decision below, since, in Eagle, the appellate court permitted the claimant and surviving spouse a full trial on the merits of her claim to recover on a group life insurance policy of which decedent was beneficiary where a genuine issue of a material fact concerning coverage existed. On its face, the Eagle decision is distinguishable from the instant matter, because no such question of material fact relating to coverage needed to be resolved after cross motions for summary

judgment were ruled upon in this matter. The interpretation and construction of the policy language concerning the coverage issue in the case at bar was a pure question of law that was appropriately decided on summary judgment.

Moreover, in Eagle, the district court granted plaintiff's motion for summary judgment, but made no statement of facts which it deemed pertinent and gave no reasons or rationale for its order granting summary judgment. Accordingly, the Tenth Circuit was unable to pass upon the merits of the controversy and so remanded for a full trial on the merits. See, Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979). Here, the district court made a detailed statement of its factual

determinations and rationale for its holding, even if partially in error, that afforded a sound basis for the Tenth Circuit to direct entry of judgment for defendant.

Thus, there is no irreconcilable conflict within the Tenth Circuit relating to, as petitioner alleges, "a recurring and important issue" of the power of appellate courts to order summary judgment for appellant.

CONCLUSION

For all of the above reasons, respondent respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

Grant, McHendrie, Haines and
Crouse
Professional Corporation
Donald M. Burkhardt
One United Bank Center
1700 Lincoln Street
Suite 3000
Denver, Colorado 80203-1086
(303) 825-5111

Counsel of Record for the
Respondent